80-5187

RECEIVED
AUG 11 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE

UNITED STATES

No. _____ Term 1980

JOHN H. TAYLOR,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Samuel J. Reich, Esquire
Jay H. Spiegel, Esquire
Attorneys for Petitioner,
John H. Taylor

Gefsky, Reich and Reich
1321 Frick Building
Pittsburgh, PA 15219

412-391-6222

QUESTION PRESENTED

WAS IT PERMISSIBLE FOR THE DISTRICT COURT TO IMPOSE SEPARATE SENTENCES AFTER PETITIONER'S CONVICTION ON TWO OVERLAPPING PROVISIONS OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 (OMNIBUS ACT) WHEN THESE CONVICTIONS INVOLVED THE SAME FIREARM, ALTHOUGH THE RECEIPT AND POSSESSION CHARGES OCCURRED ON DIFFERENT DATES?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITATIONS	iii
OPINIONS BELOW	1
JURSIDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1 - 2
STATEMENT OF THE CASE	2
ARGUMENT	3 - 4
CONCLUSION	4

Appendix "A" - Judgment Order of the United States Court of Appeals for the Third Circuit dated June 11, 1980

Appendix "B" - Memorandum and Order of the United States District Court dated and entered February 4, 1980

Appendix "C" - Indictment

Appendix "D" - Judgment and Probation/Commitment Order filed September 20, 1979

TABLE OF CITATIONS

Cases — Page

BLOCKBURGER v. U. S.
284 U.S. 295 (1980) 3

BUSIC v. U.S. (Decided May 19, 1980)
_____ U.S. _____27 CrL 3109 3

U.S. v. BATCHELDER
422 U.S. 114 (1979) 4

WHALEN v. U.S. (Decided April 16, 1980)
_____ U.S. _____ 27 CrL 3064 3

Constitution

UNITED STATES CONSTITUTION, Fifth Amendment 1, 4

Statutes

18 U.S.C. §922(h)(1). 1, 2,4

18 U.S.C. §924(a) 1

18 App. U.S.C. §1202(a)(1). 2, 4

OPINIONS BELOW

The judgment order of the United States Court of Appeals for the Third Circuit was dated and entered June 11, 1980 (Appendix "A") and, to the best of petitioner's knowledge, has not been printed or reported by any official or unofficial reporter. The Memorandum and Order of the United States District Court for the Western District of Pennsylvania was dated and entered February 4, 1980 (Appendix "B"), and, to the best of petitioner's knowledge has not been printed or reported by any official or unofficial reporter.

JURISDICTION

The judgment order of the United States Court of Appeals for the Third Circuit was dated and entered June 11, 1980 (Appendix "A"). This Petition for Writ of Certiorari was timely filed within sixty (60) days.

Jurisdiciton of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution, Fifth Amendment: "No person . . . shall be subject for the same offense to be twice put in jeopardy of life or limb. . . nor be deprived of life, liberty or property, without due process of law. . ."

2. 18 U.S.C. §922(h)(1)

"It shall be unlawful for any person . . . who is under indictment for or who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

3. 18 U.S.C. §924(a)

"Whoever violates any provision of this Chapter (§922(h)(1)) . . . shall be fined not more than

$5,000, or imprisoned not more than five (5) years, or both, and shall become eligible for parole as the Board of Parole shall determine.

4. 18 App. U.S.C. §1202(a)(1)

"Any person who . . . has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . and who receives, possesses or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearms shall be fined not more than $10,000 or imprisoned for not more than two years or both."

STATEMENT OF THE CASE

Petitioner was indicted on two counts under Titles IV and VII of the Omnibus Act, specifically charged with violating 18 U.S.C. §922(h)(1) and 18 App., U.S.C. §1202(a)(1) (Appendix "C"). On July 9, 1979, after a jury trial in the courtroom of the Honorable Rabe F. Marsh, District Court Judge for the United States District Court for the Western District of Pennsylvania, petitioner was convicted of both counts.

On September 19, 1979, the District Court sentenced petitioner and this judgment of sentence was filed on September 20, 1979 (Appendix "D"). The court imposed a sentence of two years imprisonment on each of Counts 1 and 2, the period of incarceration imposed on Count 2 to run concurrently with the sentence on Count 1. The execution of the sentence of imprisonment on Count 1 was suspended and petitioner was placed on probation for a period of five (5) years with various conditions imposed.

The evidence at trial, as it relates to the question presented can be briefly and succinctly summarized. On February 14, 1978, petitioner and his wife were with petitioner's mother-in-law at the Gunner's Den in Pittsburgh, Pennsylvania when she purchased a Browning automatic pistol. Approximately two weeks later on February 26, 1978, petitioner was arrested by agents of

the Federal Drug Enforcement Administration at which time petitioner possessed the aforementioned Browning automatic pistol. At the time both of these incidents occurred, petitioner had at least one prior felong conviction, and it was stipulated that the firearm involved had been shipped in interstate commerce.

ARGUMENT

The question presented has never been squarely answered by this Court. Counsel is unable to find binding legal precedent that an individual can be convicted and sentenced for receipt and possession of the same firearm (under two distinct, although overlapping provisions of the Omnibus Act) where the charges arose on different dates. Additionally, it is contended that this result is a violation of double jeopardy.

Generally, this court has held that there must be an affirmative showing of congressional and legislative intent before multiple punishment is permissible. Busic v. U.S., _____ U.S. _____ 27 CrL 3109 (decided May 19, 1980) and Whalen v. U.S., ____ U.S. 27 CrL 3064 (decided April 16, 1980). Busic and Whalen prohibit pyramiding of sentences. In those cases, an individual was sentenced for separate charges, each arising from the same conduct. By contrast, petitioner was sentenced for two charges involving the same firearm. Although the sentencing court indicated that distinct offenses were committed two weeks apart (Appendix "B", P. 5), this overlooks the critical factor that the same firearm was the basis of each charge and not different weapons. It is generally acknowledged that a receipt is necessary for, and therefore merges into a possession (see Busic, supra), although different elements may be necessary to prove each charge, Blockburger v. U.S., 284 U.S. 295 (1980). The fact that the same weapon forms the basis for these closely related although legally distinct charges cannot be ignored. For example, an individual in possession of the same weapon for a two week period would not be charged with 14 separate counts of possession.

The issue here is different from this court's holding in U.S. v. Batchelder, 442 U.S. 114 (1979). Batchelder was charged and convicted for violating 18 U.S.C. §922(h)(1), only. He was sentenced to the maximum five years imprisonment for this charge, and he argued that the sentencing court was required to impose the more lenient sentence of two years imprisonment under 18 U.S.C. §1202(a)(1) because of the two overalpping statutes.

In its opinion, this court acknowledged that the two provisions overlapped. It was held nevertheless that each substantive statute, in conjunction with its own sentencing provisions, operates independently of the other. Petitioner does not contend (as Batchelder argued) that he should be sentenced under the more lenient two year provision. He contends that because of the overlapping nature of these statutes, the critical factor that the same weapon was involved, and the close relation between these two types of charges, that they merge for sentencing. He, therefore, should have been sentenced under one or the other statute, not both.

Permitting in effect distinct sentences for these two overlapping charges would violate petitioner's Fifth Amendment rights by twice putting him in jeopardy. Petitioner recognizes that this court generally avoids deciding cases on constitutional grounds. The case can logically be presented and decided based on the legislative history and congressional intent or a clear redefinition of the intertwined relationship between a receipt charge and a possession charge when the same weapon is involved. However, petitioner asserts his constitutional rights and guarantees and contends the issue can be resolved on that basis.

CONCLUSION

For the foregoing reasons, it is hereby requested that

this Honorable Court issue a writ of certiorari and review the instant matter.

Respectfully submitted,

GEFSKY, REICH AND REICH

BY: Samuel J. Reich, Esquire
Jay H. Spiegel, Esquire

Attorneys for Petitioner

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA 19106

THOMAS F. QUINN
CLERK

TELEPHONE
215-597-2993

June 11, 1980

Samuel J. Reich, Esquire
Gefsky, Reich and Reich
1321 Frick Building
Pittsburgh, Pennsylvania 15219

Re: U.S.A. vs. Taylor, John H., Appellant
No. 79-2411

Dear Mr. Reich:

Enclosed herewith is conformed copy of judgment-order entered by the Court today in the above-entitled case .

Since this is an affirmance and you are Court-appointed counsel serving under the Criminal Justice Act, we call attention to the fact that Appellant has only thirty (30) days from the date of this judgment-order, or from the date of an order denying petition for rehearing, to apply to the Supreme Court of the United States for a writ of certiorari. Will you please follow up with Appellant on this and advise this office promptly? Thank you.

Very truly yours,

T. F. Quinn, Clerk

sdw
Enclosure

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2411

UNITED STATES OF AMERICA,
Appellee

v.

JOHN H. TAYLOR,
Appellant

(D.C. Crim. No. 79-00014)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
June 10, 1980
Before: GIBBONS, WEIS and SLOVITER, Circuit Judges

SAMUEL J. REICH, ESQ.
JAY H. SPIEGEL, ESQ.
1321 Frick Building
Pittsburgh, Pa. 15219

Attorneys for Appellant

ROBERT J. CINDRICH
United States Attorney
PAUL J. BRYSH
Assistant U.S. Attorney
FREDERICK W. THIEMAN
Assistant U.S. Attorney
633 U.S. Post Office and
Courthouse
Pittsburgh, Pa. 15219

Attorneys for Appellee

JUDGMENT ORDER

On this appeal from a judgment of separate sentences following conviction for violating 18 U.S.C. § 922(h)(1) and 18 U.S.C. § 1202(a)(1), appellant John H. Taylor contends

1. that he could not be sentenced separately for both convictions, and

2. that the court erred in making reference to the nature of a prior conviction which was an element of both offenses.

We find no error.

It is O R D E R E D and A D J U D G E D that the judgment of the district court is affirmed.

BY THE COURT,

John J. Gibbons
Circuit Judge

Attest:

Thomas F. Quinn
Thomas F. Quinn, Clerk

DATED: JUN 11 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Appellee	)	
v.	)	Criminal No. 79-14
	)	Third Circuit No. 79-2411
JOHN H. TAYLOR, Appellant	)	

MEMORANDUM

This case is before the Court on remand from the Court of Appeals to dispose of Appellant's Amended Motion for Correction of Sentence. The Motion was filed after the appeal was taken. In our opinion, the Motion should be denied.

The Defendant, John H. Taylor, was indicted on January 9, 1979 for violating Section 1202(a)(1), Title 18 U.S.C. Appendix. The indictment alleged that on or about the 26th day of September, 1978, the Defendant, having been convicted of a crime punishable by a term of imprisonment exceeding one year, willfully and knowingly possessed a Browning Automatic Pistol which had been transported in interstate commerce.

A superseding indictment was filed on March 7, 1979, in which the Defendant was accused of violating Section 922(h)(1), Title 18 U.S.C. Appendix, receipt of a firearm, as well as violating Section 1202(a)(1), Title 18 U.S.C. Appendix, possession of a firearm.

Count 1 alleged that on or about the 14th of September, 1978, the Defendant, having been convicted of a crime punishable by a term of imprisonment exceeding one year, willfully and knowingly received a Browning Automatic Pistol which had been transported in interstate commerce.

APPENDIX "B"

The charge of receiving on or about September 14, 1978 became Count 1. The count charging possession on or about September 26, 1978 became Count 2.

After trial, the jury found the Defendant guilty of both counts.

The Defendant was sentenced on September 20, 1979 as follows:

> As to Count 1, committed to custody for two years.
>
> As to Count 2, committed to custody for two years to run concurrently with the sentence imposed on Count 1.
>
> The execution of the sentence to imprisonment as to Count 1 was suspended and the Defendant was placed on probation for five years upon various conditions. No fine. No costs.

Notice of appeal in forma pauperis was filed on September 27, 1979. Bond was continued. The record was mailed to the Court of Appeals on October 2, 1979. Thereafter, the Motion and Amended Motion for Correction of Sentence were filed.

The evidence established that the Defendant's mother, Ida Taylor, purchased the pistol in question on September 14, 1978 at the Gunner's Den, located in Pittsburgh. On the same day, Mrs. Taylor gave the pistol to the Defendant, which formed the basis for the conviction of receiving the pistol in Count 1.

About two weeks later on September 26, 1978, the Defendant was confronted at the Viking Motor Inn by the agents of the Drug Enforcement Administration (DEA) who were investigating a heroin distribution network. As the Defendant was approached by the agents, he whirled around and reached for a

pistol in his waistband. This was the same pistol the Defendant had received from his mother on September 14, 1978.

Although tried and convicted on two separate sections of the Code, the Defendant contends that this Court only had authority and discretion to impose sentence on one count or the other, that is, either count which carries the harsher or more lenient penalty, but not both. The Defendant argues that the Court is so restricted whether or not the sentences imposed are concurrent or consecutive.

In the Defendant's case, as stated, concurrent jail sentences were imposed on Counts 1 and 2, and the execution of the jail sentence on Count 1 was suspended with a term of probation to begin after the jail sentence imposed on Count 2 was served. Defendant argues that as a practical matter, he was sentenced separately on each count, with the result being consecutive sentences. We agree.

In United States v. Batchelder, 441 U.S. 903 (1979), 25 Criminal Law Reporter 3109, Sections 922 (h)(1) and 1202(a)(1), two overlapping provisions of the Omnibus Crime Control and Safe Streets Act, were reviewed and it was held that although each section made it unlawful, inter alia, to receive a firearm by one previously convicted of a felony, nevertheless, ". . . each substantive statute, in conjunction with its own sentencing provision, operates independently of the other." (Emphasis supplied) Thus, a person convicted of § 922(h)(1), receiving, was subject to penalties provided by § 924(a), which authorized a fine of $5,000 and a maximum of five years imprisonment; and a person convicted under § 1202(a)(1), receiving, authorized a fine of $10,000 and a maximum of two years imprisonment.

Since Batchelder was convicted under § 922(h)(1) for receiving a firearm, the Court held his sentence of imprisonment for five years under § 924(a) was valid, and the trial judge was not required to impose the more lenient sentence of two years imprisonment for receiving a firearm under § 1202(a)(1).

In the case sub judice, the Defendant was indicted under § 922(h)(1) for receiving a firearm, and under § 1202(a)(1) for possession of a firearm. Without doubt under Batchelder each provision "operates independently of the other." Since two crimes are charged, the Defendant may be sentenced under each.

The Defendant cites Simpson v. United States, 435 U.S. 6, and United States v. Nelson, 574 F.2d 277 (5th Cir. 1978), in support of his contention that this Court did not have authority to impose separate sentences, whether concurrent or consecutive, where Defendant's conviction was the result of "a single transaction" which violated two separate but identical provisions of the Omnibus Act. He contends that these convictions should have been merged for sentencing.

In Simpson v. United States, supra, the defendant was convicted of two separate offenses arising from a single transaction, i.e., armed bank robbery, Title 18 U.S.C. § 2113(d), and use of a dangerous weapon to commit a Federal felony, Title 18 U.S.C. § 924(c). It was held that in a prosecution growing out of a single transaction, i.e., a bank robbery with firearms, a defendant may not be sentenced under both §§ 2113(d) and 924(c).

The Defendant's effort to have this Court rely on Simpson fails because the facts taken in the light most favorable to the Government disclose proof of two distinct transactions on two different days, i.e., receipt on September 14, 1978 and possession on September 26, 1978. Also, the proof discloses two

distinct sets of facts and witnesses to two different series of elements. In short, the "single transaction" of Simpson is lacking. Without a single transaction, Defendant's reliance on Simpson is not persuasive.

Since Nelson, supra, simply follows the reasoning of the Simpson case, it too lacks merit, and therefore the Defendant lacks valid grounds to rely on that case in a supportive manner to justify his Amended Motion for Correction of Sentence.

On the other hand, in Blockburger v. United States, 284 U.S. 299 (1931), wherein the petitioner was charged with and convicted of violating two sections of the Harrison Narcotics Act,[1/] it was held, page 304, that:

> "Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. Gavieres v. United States, 220 U.S. 338, 342 and authorities cited. . . . Applying the test, we must conclude that here, although both sections were violated by the one sale, two offenses were committed."

In the case sub judice, two distinct statutory provisions were violated, i.e., receipt of a firearm, and, about two weeks later, possession of the firearm. Each provision required proof of a fact the other did not. Our conclusion is that two offenses were committed. In accord: see United States v. Brisbane, 239 F.2d 859 (3d Cir. 1956); United States v. Makres, 598 F.2d 1072 (7th Cir. 1979).

---

1. Title 26 U.S.C. § 692 and § 696.

An appropriate order will be entered.

Robert J. Marsh
United States District Judge

Dated: February 4th, 1980

cc: Bruce A. Antkowiak, Esq.
Assistant U.S. Attorney

Samuel J. Reich, Esq.
Jay Spiegel, Esq.
1322 Frick Bldg.
Pittsburgh, PA 15219

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Appellee	)	
v.	)	Criminal No. 79-14
JOHN H. TAYLOR, Appellant	)	Third Circuit No. 79-2411

ORDER OF COURT

AND NOW, this 4th day of February, 1980, upon remand from the United States Court of Appeals for the Third Circuit, after argument and due consideration of the briefs, IT IS ORDERED that the Amended Motion for Correction of Sentence filed by the Appellant, John H. Taylor, be and the same hereby is denied.

Rob F. Marsh
United States District Judge

cc: Bruce A. Antkowiak, Esq.
Assistant U.S. Attorney

Samuel J. Reich, Esq.
Jay Spiegel, Esq.
1322 Frick Building
Pittsburgh, PA 15219

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 79-14
	)	(18 U.S.C. §922(h)(1) and 18
JOHN H. TAYLOR	)	Appendix, U.S.C. §1202(a)(1))

The grand jury charges:

That on or about the 14th day of September, 1978, in the County of Allegheny, in the Western District of Pennsylvania, the defendant JOHN H. TAYLOR, having been convicted of a crime punishable by a term of imprisonment exceeding one year by the Court of Common Pleas of Allegheny County, that is, JOHN H. TAYLOR had been convicted on April 3, 1978, of a violation of the Pennsylvania Uniform Firearms Act, which is a crime punishable by a term of imprisonment exceeding one year, willfully and knowingly received one nine millimeter Browning Automatic Pistol, Serial No. 76C27955, which had been shipped and transported in interstate commerce.

In violation of Title 18, United States Code, Section 922(h)(1).

APPENDIX "C"

COUNT TWO

The grand jury further charges:

On or about September 26, 1978, in the Western District of Pennsylvania, the defendant JOHN H. TAYLOR, having been convicted of a crime punishable by a term of imprisonment exceeding one year by a court of the Commonwealth of Pennsylvania, that is, JOHN H. TAYLOR having been convicted on April 3, 1978, of a violation of the Pennsylvania Uniform Firearms Act in Allegheny County, Pennsylvania, which is a crime punishable by a term of imprisonment exceeding one year, willfully and knowingly possessed one nine millimeter Browning Automatic Pistol, Serial No. 76C27955, which had been transported in interstate commerce.

In violation of Title 18 Appendix, United States Code, Section 1202(a)(1).

A True Bill,

_____
FOREMAN

_____
ROBERT J. CINDRICH
United States Attorney

nited States of America vs.

United States District Court

WESTERN DISTRICT OF PENNSYLVANIA

DEFENDANT: JOHN H. TAYLOR

DOCKET NO.: 79-14 Criminal

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: September DAY: 19 YEAR: 1979

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[XX] WITH COUNSEL Samuel Reich and Jay Speigel, Esquires (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FILED

FINDING & JUDGMENT

There being a XXXXX/verdict of
[ ] NOT GUILTY. Defendant is discharged
[XX] GUILTY.

CLERK, U. S. DISTRICT COURT
WEST. DIST. OF PENNSYLVANIA

Defendant has been convicted as charged of the offense(s) of Count 1: Wilfully and knowingly receiving a firearm which had been shipped and transported in interstate commerce after having been convicted of a crime. (18 USC, 922(h)(1) and Count 2: Wilfully and knowingly possessing a firearm which had been transported in interstate commerce after having been convicted of a crime (18 Appendix USC, 1202(a)(1)) and the Court finds that the defendant was 22 years of age at the date of conviction and is not suitable for handling under the Young Adult Offenders Act,

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted [illegible]

IT IS ADJUDGED that as to Count 1 the defendant is hereby committed to the custody of the Attorney General for imprisonment for a period of two (2) years.

IT IS ADJUDGED that as to Count 2 the defendant is hereby committed to the custody of the Attorney General for imprisonment for a period of two (2) years to run concurrently with the sentence imposed on Count 1. The execution of the sentence as to imprisonment on Count 1 is suspended and the defendant placed on probation for a period of five (5) years upon the following terms and conditions:

SPECIAL CONDITIONS OF PROBATION

1. That the defendant refrain from all violations of law and not carry firearms on himself nor have any firearms in his home.
2. That the defendant refrain from selling narcotic drugs.
3. That the defendant comply with the rules and regulations of the probation office.

Said sentence to become effective on Monday, October 1, 1979 at which time the defendant is to report to the U.S. Marshal, Eight Floor, U.S. Post Office & Courthouse on or before 12:00 Noon to commence serving his sentence.

(CONTINUATION OF SENTENCE ON PAGE 2)

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
[ ] U.S. District Judge
[ ] U.S. Magistrate

Date 9/20/79

APPENDIX "D"

CONTINUATION OF THE SENTENCE OF DEFENDANT JOHN H. TAYLOR

IT IS FURTHER ORDERED that the probation sentence imposed on Count 1 shall commence upon defendants' release from confinement on Count 2. No fine. No costs.

Certified from the Record
Date SEP 20 1979
Acting for the Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

80-5187

No.

JOHN H. TAYLOR,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

RECEIVED
AUG 11 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

AND NOW COMES petitioner John H. Taylor by his attorneys Samuel J. Reich and Jay H. Spiegel and pursuant to Supreme Court Rule 46 files the instant motion and in support thereof respectfully represents as follows:

1. Petitioner is without sufficient funds to pay for the fees and costs involved in connection with the filing of a Petition for a Writ of Certiorari.

2. Petitioner previously sought leave to proceed in forma pauperis in the lower court and on September 27, 1979 the Federal District Court entered an order permitting petitioner to proceed in forma pauperis in his appeal of the instant matter to the United States Court of Appeals for the Third Circuit. Additionally, present counsel was appointed pursuant to the Criminal Justice Act of 1964. (See Exhibit 1, attached).

3. The United States Court of Appeals for the Third Circuit has also acknowledged that present counsel was appointed pursuant to the Criminal Justice Act of 1964 by letter dated June 11, 1980 (See Exhibit 2, attached).

4. Because counsel has been appointed under the Criminal Justice Act of 1964 petitioner is not filing an affidavit with this motion.

5. Simultaneously, with the filing of this motion, counsel has caused to be filed with this court a Petition for a Writ of Certiorari.

WHEREFORE, petitioner respectfully requests that he be granted leave to proceed in forma pauperis pursuant to Supreme Court Rule 46; and that all fees and costs in connection with this matter be waived.

Respectfully submitted,

Samuel J. Reich
Jay H. Spiegel
Attorneys for Petitioner

Gefsky, Reich and Reich
1321 Frick Building
Pittsburgh, Pennsylvania 15219
(412) 391-6222

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 79-14
	)	
JOHN H. TAYLOR	)	

ORDER OF COURT

AND NOW, this 27th day of September, 1979, the defendant, John H. Taylor, having filed pro se an "Application for Leave to Proceed on Appeal in Forma Pauperis and for Appointment of Counsel" together with an affidavit in support thereof, and a "Motion to Continue Bond on Appeal," IT IS ORDERED that the defendant, John H. Taylor, be permitted to proceed in forma pauperis on appeal.

IT IS FURTHER ORDERED that defendant's motion to continue bond on appeal be and the same hereby is granted.

IT IS FURTHER ORDERED that Samuel Reich, trial counsel in the above-entitled case, be appointed as counsel to represent the defendant on appeal.

Paul F. Marsh
United States District Judge

cc: John H. Taylor
106 Wabash Avenue
Pittsburgh, Pa. 15220

✓ Samuel J. Reich, Esq.
1321 Frick Building
Pittsburgh, Pa. 15219

Frederick W. Thieman
Assistant U.S. Attorney

U. S. Marshal
U. S. Probation Office

EXHIBIT "1"

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA 19106

THOMAS F. QUINN
CLERK

TELEPHONE
215-597-2995

June 11, 1980

Samuel J. Reich, Esquire
Gefsky, Reich and Reich
1321 Frick Building
Pittsburgh, Pennsylvania 15219

Re: U.S.A. vs. Taylor, John H., Appellant
No. 79-2411

Dear Mr. Reich:

Enclosed herewith is conformed copy of judgment-order entered by the Court today in the above-entitled case .

Since this is an affirmance and you are Court-appointed counsel serving under the Criminal Justice Act, we call attention to the fact that Appellant has only thirty (30) days from the date of this judgment-order, or from the date of an order denying petition for rehearing, to apply to the Supreme Court of the United States for a writ of certiorari. Will you please follow up with Appellant on this and advise this office promptly? Thank you.

Very truly yours,

Thomas F. Quinn

T. F. Quinn, Clerk

sdw
Enclosure

EXHIBIT "2"

2nd

RECEIVED
SEP 17 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 80-5187

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

ORIGINAL COPY

JOHN H. TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 80-5187

JOHN H. TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner contends (Pet. 3-4) that the district court impermissibly sentenced him to consecutive sentences of imprisonment for receiving and possessing the same firearm.

1. Following a jury trial in United States District Court for the Western District of Pennsylvania, petitioner, a previously convicted felon, was convicted of unlawfully receiving a firearm, in violation of 18 U.S.C. 922(h)(1), and unlawfully possessing the same firearm, in violation of 18 U.S.C. App. 1202(a)(1). He was sentenced to two-year terms of imprisonment on each count. The district court suspended execution of sentence on the receipt count and sentenced petitioner to five years' probation, to commence upon petitioner's release from custody on the possession count. The court of appeals summarily affirmed (Pet. App. A).

The evidence at trial showed that on September 14, 1978, petitioner's mother purchased a pistol in Pittsburgh, Pennsylvania, and gave it to petitioner. Thereafter, on September 26, 1978, petitioner, who had previously been convicted of a firearm felony in Pennsylvania, was confronted at a motel by Drug Enforcement agents investigating a heroin distribution network. As the agents approached, petitioner reached for the pistol, which was in his waistband. After a brief struggle, the agents subdued and arrested petitioner (Pet. App. B 2-3).

2. Whether cumulative punishments are permissible in a particular circumstance is primarily a question of legislative intent. See Whalen v. United States, No. 78-5471 (Apr. 16, 1980), slip op. 4; Simpson v. United States, 435 U.S. I, II, 11-12 (1978); Brown v. Ohio, 432 U.S. 161 (1977). See also Busic v. United States, No. 78-6020 (May 19, 1980), slip op. 4. Petitioner argues that Congress did not intend to permit consecutive sentences where, as here, a person unlawfully receives a firearm and thereafter continuously possesses the same firearm until the time of his arrest. Neither the language nor the legislative history of Sections 922(h) and 1202(a) conclusively answers this question. However, since receipt of a firearm will almost necessarily entail possession of that firearm (Scarborough v. United States, 431 U.S. 563, 579 (1977) (Stewart, J., dissenting)), we agree with petitioner

that it is unlikely that Congress intended to permit consecutive punishment in the circumstances presented here. [1/] See United States v. Larson, No. 79-5597 (5th Cir. Aug. 28, 1980); United States v. Girst, No. 77-1604 (D.C. Cir. Mar. 28, 1979). Cf. Heflin v. United States, 358 U.S. 415 (1959); Prince v. United States, 352 U.S. 322 (1957). But see United States v. Larranaga, 614 F.2d 239 (10th Cir. 1980).

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further proceedings in light of the position we have taken herein.

WADE H. McCREE, JR.
Solicitor General

SEPTEMBER 1980

1/ Consecutive sentences would in our view be permissible, however, where the defendant received and transported the same firearm or where the defendant received the firearm on one occasion and, after giving up possession of it, reacquired the same firearm on another occasion. See United States v. Musgrove, 581 F.2d 406, 407 (4th Cir. 1978); cf. Woody v. United States, 258 F.2d 535 (6th Cir. 1957), aff'd by equally divided Court, 359 U.S. 118 (1959) (receipt and transportation of stolen car may be consecutively punished under Dyer Act).